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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM Horry County
Court of Common Pleas

Hon. H. Steven DeBerry, Circuit Court Judge

Case No. 2021-CP-26-01461

Alqi Dhimo,

Petitioner,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Alqi Dhimo, Petitioner, appeals the Order of Dismissal issued by the Honorable H. Steven DeBerry on March 9, 2023. Petitioner, through counsel, received notice of the entry of the Order on March 29, 2023.

Date: March 29, 2023



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Attorney for Petitioner

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STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
)
 Alqi Dhimo,)
 Applicant,)
)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTEENTH JUDICIAL CIRCUIT SUPREME COURT

Case No.: 2021-CP-26-01461

ORDER OF DISMISSAL

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 HORRY COUNTY

This matter comes before this Court by way of Applicant's post-conviction relief application filed March 9, 2021. Respondent made its return on April 26, 2021, requesting an evidentiary hearing be convened. An evidentiary hearing was held on November 30, 2022, at the Horry County Courthouse. Christopher R. Geel, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel John Reuben Long, II, and Prosecutor Mary-Ellen Walter, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant was indicted for attempted criminal sexual conduct, third degree (2015-GS-26-04000), indecent exposure (2015-GS-26-04001), and kidnapping (2015-GS-26-04002) by the Horry County Grand Jury at its September 2015 term. Applicant was represented by Attorney John Reuben Long, II, and Assistant Solicitors Mary-Ellen Walter and C. Leigh Andrew, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. The indictment for kidnapping was dismissed, *nolle prosequi*. Applicant proceeded to a jury trial on January 8, 2018, before the

Honorable Steven H. John, circuit court judge. The jury acquitted Applicant of indecent exposure but convicted him, as indicted, of attempted criminal sexual assault, third degree. Judge John sentenced him to eight years' imprisonment and required him to register as a sex offender.

Applicant filed a timely notice of appeal, and the appeal was perfected by Joanna Delaney, of the South Carolina Commission on Indigent Defense. Applicant raised the following issue on appeal:

1. Whether the trial court erred in refusing to grant appellant a directed verdict on the charge of attempted third degree criminal sexual conduct where it was undisputed the complainant was voluntarily engaging in foreplay with appellant prior to being found unconscious on the beach, where there was no direct evidence and no substantial circumstantial evidence that appellant attempted to commit an overt sex act on a physically helpless, mentally defective, or mentally incapacitated person?

The South Carolina Court of Appeals affirmed the conviction and dismissed the appeal.

State v. Dhimo, Op. No. 2020-UP-031 (S.C. Ct. App., Filed February 5, 2020). Applicant filed a petition for writ of certiorari with the South Carolina Supreme Court, which was denied on November 25, 2020. The remittitur was sent on December 4, 2020.

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Summary of Relevant Facts

On June 21, 2015, Victim and her boyfriend Justin Stephenson attended a barbecue at her mother's house. Upon departure, Victim was intoxicated. Victim and Stephenson got into an argument over smoking cigarettes inside the vehicle and loud music when Stephenson pulled into a gas station. Victim exited the vehicle and refused to return home with Stephenson. Victim texted Stephenson and informed him she would take a taxi. (Tr. 54-58).

Security guards Benjamin Thompson and Joyce Chestnut Dixon were on patrol nearby when they observed a taxi parked at the building with the engine running. Concerned, they began looking around the area to see if they could find the driver or someone associated with the taxi.

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As they approached, they heard someone "hollering" at them to stop moving and stay away. Looking around, they saw a male figure wearing a dark-colored shirt and white underwear pulled down around his knees who jumped up. He was unclothed around his crotch area. They saw a human-shaped figure on the ground by Applicant. Thompson asked Applicant if "everything was okay," but did not receive a response. Instead, Applicant moved over towards a "white object" and started to get dressed. Thompson maintained visual contact with Applicant the entire time and contacted the police. (Tr. 109-27).

Officer Daniel Eddy was the first responding officer. When he arrived, he observed a taxi parked sideways in the beach access and spoke with security guards who confirmed they reported the man. He began walking down the beach to locate the reported man when he located Applicant standing up. He also found Victim, laying with her face down in the sand, almost as if she were in the fetal position. He noticed Victim's bathing suit bottom/underwear were pulled to the side, exposing her privates. When he tried to wake Victim, she was unresponsive. He called for backup and EMS while detaining Applicant. (Tr. 64-68).

After backup arrived, officers woke Victim up using smelling salts. She was heavily intoxicated, unable to walk by herself, and could not provide answers to basic questions such as her name or where she lived. She was placed inside the ambulance. While placing Applicant in his vehicle, Officer Eddy observed scratch marks behind his left shoulder and bite marks down his arm. Victim was visibly upset and crying. Later, in Applicant's cab, Officer Eddy found Victim's purse and cellular phone. (Tr. 68-74, 77-78).

Officer Zachary Cooper, the officer who used smelling salts to wake Victim, testified that, Victim also threw up. Her speech was slurred, and she was distraught. Emotional, Victim

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constantly reiterated she just wanted to go home to her boyfriend. She had a powerful "odor of alcohol." (Tr. 89-108).

Officer David Bailey, a crime scene specialist, took photographs of Applicant after the crime, revealing bruising, scratches, and a bite mark on Applicant's left upper arm. (Tr. 256-66).

Officer Scott Williamson collected evidence from Applicant's taxi, including the dashboard camera.¹ He viewed the video recorded by the record and noted it shows: (1) Applicant turning off the camera soon after initialing picking up Victim; (2) Victim, intoxicated, flirting with Applicant and telling him she "loved [him]"; (3) Applicant requesting Victim that she "[l]et [him] love [her]"; (4) Victim passing out in the driver's seat of the cab and Applicant getting her out of the vehicle, at which time she told him to "stop it," "get away from me," and other statements. (Tr. 161-77).

Chad Morenus, a bar tender at Jimmagan's Pub in Myrtle Beach, was working that night when he saw Victim and Applicant at the bar. He served them three or four shots each (Tr. 132-40).

Emily Hennig-Ryan, a nurse with Grand Strand Medical Center, treated Victim when she was taken to the hospital. testified Victim consented to the use of the kit and she was prohibited to use rape kits on the victims of sexual assault without their consents. Jennifer Michelle Brown, a forensic toxicologist with SLED, tested blood samples obtained from Victim and concluded her blood alcohol concentration (BAC) was 0.169 percent at the time it was drawn, and would have been around 0.332 percent at the time of her assault. According to Brown, someone with such a significant BAC loses control of her motor functions, is usually unconscious and at risk for

¹ The dashboard camera was installed in Applicant's taxi cab as a condition of bond from a 2014 charge of first degree criminal sexual conduct. (Pretrial Tr.p. 20).

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death. Catherine Leisy, a forensic scientist with SLED, analyzed Victim's fingernail scrapings. The partial DNA profile developed from the major contributor to the mixture under Victim's right fingernails matched Applicant. (Tr. 194-219, 240-51).

Detective Carol Allen interviewed Victim and Applicant after they were taken to the police station. Victim was loud, screaming, crying, and not in "any shape to be interviewed at that time." Applicant did not appear to be intoxicated and could answer all her questions. He did not inform Detective Allen that he and Victim stopped by Jimmagan's Pub or that his interaction with Victim transitioned from a cab ride to a date. He eventually admitted Victim was "completely passed out and would not wake up." (Tr. 270-301).

Detective Hugh Jones reviewed the dash cam video of Applicant's cab. Applicant picked up Victim and had a brief conversation before the video stopped. The recording resumed approximately thirty minutes later when the two left Jimmagan's. Applicant chose to drive around rather than take Victim directly home. After a second stop, Victim enters the driver's seat and begins driving towards her home but ended up stopping at the beach access where the cab was found. Detective Jones observed Applicant never activated the fare meter. Victim was unable to recall anything after the stop at Jimmagan's. (Tr. 304-28).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Yes, my lawyers not represent [illegible] all fact and trial judges not fair.
 - a. All my video not represent. The lawyers not represent all fact. Not fair court trial.
 - b. The fact the victim never testified. Is dead because overdose. Dead after accused me overdose.
 - c. The fact victim never testified. The court never make [illegible] without [illegible]. Never proved the truth.

At the PCR hearing, Applicant proceeded forward on the allegations listed in his

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amended application, filed November 30, 2022:

1. Ineffective assistance of counsel:
 - a. For failure to object to improper expert testimony about retrograde alcohol extrapolation and speculation about the victim's level of intoxication.
 - b. For failure to object to opinion testimony from the State's witness regarding the defendant's statement's consistency/inconsistency with the other evidence in the case.
 - c. Failure to object to the prosecution's initial comment on defendant's invocation of his right to remain silent, and acquiescing to the Court's instruction that the Sate was permitted to do so.

Applicant also proceeded forward on the following:

1. Prosecutorial misconduct because the taxi and body camera video footage was tampered with.
2. Ineffective assistance of counsel for erroneously telling him not to testify at trial.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant stated that he was represented by Counsel for about two, two-and-a-half years. He stated he hired Counsel because he was not happy with his prior lawyer. He stated he trusted Counsel. He stated that he met with Counsel at the jail two or three times. He stated that the entire video footage was not presented at trial. He stated he was the victim. He stated that the State tampered with video footage. He stated that he discussed the right to testify with Counsel, but Counsel told him not to because he was Indian, and the victim was white. He stated that the woman lied, and he was only trying to help the girl. He stated that he had video surveillance in the cab because of a prior court order.

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Counsel Testimony

Counsel stated that he represented Applicant for a long time and met with him between twenty and thirty times. He stated that he thought Applicant was heated and argumentative and did not organize his thoughts well, which is why he encouraged him not to testify. He stated that the fact that the victim was highly intoxicated was established and he did not want to spotlight the BAC number. He stated that this was the reason why he did not object to mention of her intoxication. He stated that he should have objected to retrograde extrapolation if it was not admissible and that he did object at one point. He stated that he did not think the officer addressing Applicant's inconsistent statements was objectionable because he was just offering his opinions. He stated he objected for speculating, but not based on him offering his opinion. He stated that he does not deal with the State commenting on Applicant remaining silent often, but that he objected when the State did so.

Prosecutor Testimony

Prosecutor testified that the videos were not tampered with. She stated she used expert witnesses in alcohol extrapolation before but was unsure if it was in South Carolina. She stated that it was deemed admissible when she did it before. She stated there was a video redaction regarding Applicant's right to remain silent. She stated this was the only time in nearly thirty years or practice where she mentioned Applicant's decision to remain silent, but she thought she was able to mention it because of the Judge's directive.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Horry County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial

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transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of

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representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."

Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The court makes this determination based upon the totality of the evidence. *Id.* at 695.

Realistically, this matters "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Retrograde Alcohol Extrapolation

Applicant alleges Counsel was ineffective for failing to object to testimony concerning retrograde alcohol extrapolation. Whether failure to object constitutes deficient performance

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generally hinges on whether or not a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where “counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel”).

The record reflects Counsel objected to this testimony and a bench conference occurred thereafter. (Tr. 216). Additionally, Respondent cited some authority, though loosely related, that established a recognition that an expert *can* testify concerning retrograde extrapolation at trial. *See Hartfield v. Getaway Lounge & Grill*, 388 S.C. 407, 697 S.E.2d 558 (2010) (finding that expert testimony concerning alcohol extrapolation is not impermissibly speculative). Further, Prosecutor credibly testified that she presented this type of testimony, and it was found admissible in other cases. Thus, this Court finds that an objection likely would not have been sustained and Applicant’s trial would not have been impacted based on the testimony of Counsel’s decision to or not to object. Accordingly, relief is denied.

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Opinion Testimony

Applicant claims Counsel was ineffective for failure to object to the officer’s opinion on Applicant’s consistent/inconsistent statements when held up to other evidence in the case. Counsel credibly testified that he thought this testimony was admissible. Regardless, this Court finds that these statements likely did not impact the outcome at trial. Accordingly, Applicant has failed to meet his burden of proof and relief is denied.

Right to Remain Silent

Applicant claims Counsel was ineffective for failure to object to the State’s comment on Applicant’s invocation on his right to remain silent and for acquiescing to the Court’s instruction

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that the State could do so. This Court finds Counsel acted reasonably in the face of a difficult situation. Counsel initially objected to the State saying that the detective ended the interview because it was a false statement of fact. (Tr. 280-82). There was a conversation then held outside the presence of the jury. In that conversation, the Court told the State they could ask about Applicant electing to end the conversation. (Tr. 281-85). Though Counsel did not object, this Court finds that an objection likely would have been overruled and the State would have pursued the same line of questioning. Once the State asked about Applicant's lack of cooperation, Counsel objected again and another conversation was held outside the presence of the jury where, in part, the State was scolded by the judge regarding asking the question. (Tr. 301). Counsel then moved for a mistrial. (Tr. 302). The question was struck, and a curative instruction given to the jury, upon Counsel's request. (Tr. 302-03).

Amidst all of this, Counsel's behavior was reasonable. However, this Court is disinclined to find that, even if Counsel's behavior was different, the result at trial would have been different. Accordingly, relief is denied on this ground.

Telling Applicant not to Testify

Applicant claims Counsel was ineffective for telling Applicant not to testify at trial. "The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. However, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." *Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations." *Id.* "A defendant's decision to testify or not must be made with

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knowledge of the consequences of either choice." *Id.*

Counsel credibly testified that he was worried Applicant's testimony at trial would be consistent with the testimony proffered at the PCR hearing. Specifically, he was worried it would not play to a jury because Applicant would be scattered and angry while testifying. He stated he thought this would not be helpful at trial. This Court agrees. Additionally, this Court finds that Applicant was engaged in a thorough colloquy about his right to testify. (Tr. 341-44). After this colloquy, Applicant elected not to testify. Thus, this Court finds Counsel's advice reasonable, and that Applicant made the decision to forego testifying voluntarily and knowingly. Further, this Court declines to find prejudice, as the testimony likely would not have been helpful to the defense. Accordingly, relief is denied.

Prosecutorial Misconduct

Applicant claims prosecutorial misconduct for tampering with the videos. There was no evidence presented indicating any amount of fabrication. Additionally, Prosecutor credibly testified that she did not tamper with the evidence in any way and Counsel credibly testified that he did not see any indications in the evidence that it was tampered with. Accordingly, relief is denied on this ground.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991),

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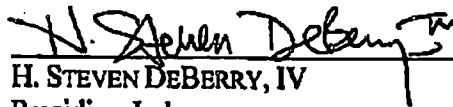
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an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice.

AND IT IS SO ORDERED this 6th day of MARCH, 2023.


H. STEVEN DEBERRY, IV
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina.

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